

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY WAGNER)	
Claimant)	
VS.)	
)	
LAFARGE CORPORATION)	Docket No. 205,642
Respondent)	
AND)	
)	
CNA INSURANCE COMPANIES)	
Insurance Carrier)	

ORDER

Respondent appeals from the Award of Administrative Law Judge Robert H. Foerschler dated January 30, 1998. Oral argument was held August 18, 1998, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Michael R. Lawless of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) Is claimant precluded from obtaining benefits beyond medical treatment pursuant to K.S.A. 44-501(c) as interpreted by Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), and Osborn v. Electric Corporation of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ____ (1997)?

- (2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board finds that the Award of the Administrative Law Judge sets out findings of fact and conclusions of law in some detail, and it is not necessary to repeat those herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are accurate and appropriate, and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein.

Respondent contends claimant should be denied entitlement to an award in excess of his medical treatment, pursuant to K.S.A. 44-501(c), as interpreted by Boucher, *supra*, and Osborn, *supra*. The record shows claimant missed no work for respondent from the October 5, 1994, date of accident through his date of termination in April 1995. However, after his termination, claimant went to work for a different employer and, during this employment, claimant missed numerous days as a result of medical treatment necessitated by the injury suffered with respondent. K.S.A. 44-501(c) states that permanent benefits will be denied beyond medical treatment if the employee is not disabled for a period of at least one week from earning full wages at the work at which the employee "is" employed. The statute does not obligate that the employee be disabled from earning wages at the job claimant was working on the date of accident. As claimant missed numerous days at his new job while undergoing medical treatment for the injury suffered with respondent, this precludes the application K.S.A. 44-501(c) in this instance.

Claimant returned to work with respondent after the injury at a comparable wage and, after his termination of employment with respondent, obtained other employment at a wage which was at least 90 percent of his wage on the date of accident. Thus, under K.S.A. 44-510e, claimant would not be eligible for a work disability, as he is engaging in work for wages equal to 90 percent or more of the average weekly wage that he was earning at the time of the injury.

In considering the functional impairment to which claimant is entitled, the Appeals Board accepts the Administrative Law Judge's rejection of Dr. Dale Darnell's opinion of claimant's preexisting condition. While Dr. Darnell did assess claimant a 3 percent impairment for a preexisting condition, he acknowledged in his deposition testimony that his opinion was arbitrary. The Appeals Board finds the opinion of Dr. P. Brent Koprivica to be more credible, and awards claimant a 16 percent whole body functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 30, 1998, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Lawless, Overland Park, KS
Timothy G. Lutz, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director